BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SEBASTIAN FLORES	)	
Claimant	)	
VS.	)	
	)	Docket No. 186,499
MONFORT, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant requested review of the Award dated March 12, 1996, entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on August 6, 1996.

APPEARANCES

Claimant appeared by his attorney, Thomas R. Fields of Kansas City, Kansas. Respondent appeared by its attorneys, Terry J. Malone and Alisa A. Nickel of Dodge City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge found claimant refused to perform an accommodated job and, therefore, awarded claimant permanent partial general disability benefits based upon a 6 percent whole body functional impairment rating. Claimant contends he is entitled to a work disability. At oral argument, the parties agreed the following two issues only were before the Appeals Board for review:

(1) Nature and extent of disability.

(2) Whether Administrative Law Judge Shannon S. Krysl had the jurisdiction to extend respondent's terminal date to allow respondent to depose Dr. C. Reiff Brown a second time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be affirmed.

Claimant argued Administrative Law Judge Shannon S. Krysl did not have jurisdiction to extend respondent's terminal date to allow respondent to depose Dr. Brown a second time. Because that issue was not raised before the Administrative Law Judge for a decision at time of final award, the Appeals Board will not address it for the first time on this review. K.S.A. 1995 Supp. 44-555c limits Appeals Board review to those questions of law and fact presented to the administrative law judges. Therefore, Dr. Brown's second deposition shall remain part of the evidentiary record.

The second issue to be addressed is whether the public policy statement expressed in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), should be applied to the facts in this case and the November 2, 1993, work-related accident now before us. In Foulk, the Court said:

> "Construing K.S.A. 1988 Supp. 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and the worker had refused to even attempt the job. The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system."

The Appeals Board has found in the past that although Foulk addresses the predecessor to K.S.A. 44-510e, as amended, the public policy remains the same and, therefore, its rationale is also applicable to those accidents occurring on and after July 1, 1993.

Claimant contends he discontinued working the job respondent provided because it required him to constantly bend and it was, therefore, outside his work restrictions and limitations. Respondent contends claimant is a symptom magnifier and that claimant could perform the job within his work restrictions and limitations but voluntarily chose not to.

Based upon the entire record, the Appeals Board finds that after the injury respondent offered and provided claimant a job within his restrictions and capabilities paying a comparable wage. The Appeals Board also finds that claimant refused without justification to perform that job. This conclusion is based upon the testimony of Loren Engert and Vicki Katz who both testified that they found claimant a job flushing intestines which did not violate claimant's permanent work restrictions. Ms. Katz testified that she even twice visited claimant on that job to demonstrate proper body mechanics and show claimant how the job could be performed without violating his medical restrictions. Ms. Katz also testified that she had observed the job and that it did not violate Dr. Pedro Murati's permanent restrictions of no pushing, pulling, or lifting over 20 pounds; no frequent bending, stooping, squatting, or crouching; and no working above shoulder level.

In addition to Mr. Engert's and Ms. Katz' testimony, Dr. George Fluter, a physician board certified in physical medicine who was selected by Administrative Law Judge Thomas Richardson to perform an independent medical examination, viewed two video tapes of the intestines job and testified that it would not violate claimant's restrictions. Likewise, orthopedic surgeon Dr. C. Reiff Brown viewed the videotapes of the intestines job and testified that claimant could perform that job. Finally, Dr. Murati testified that claimant could perform the intestines job if the platform upon which claimant would stand or the table where claimant would work could be adjusted to the correct height to eliminate the slight bending that would otherwise be required. The Appeals Board finds the greater weight of the evidence indicates those adjustments could be made.

When considering all the evidence, the Appeals Board finds it is more probably true than not true that claimant could perform the intestines job respondent provided claimant and that under the rationale of the Foulk decision claimant should be limited to permanent partial general disability benefits based upon functional impairment.

The Appeals Board finds that claimant should receive permanent partial general disability benefits based upon his functional impairment rating of 6 percent as determined by the Administrative Law Judge. The 6 percent whole body functional impairment rating is established by Dr. Fluter's testimony which is found persuasive.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated March 12, 1996, entered by Administrative Law Judge Jon L. Frobish should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas R. Fields, Kansas City, KS
C. Albert Herdoiza, Kansas City, KS
Alisa A. Nickel, Dodge City, KS
Terry J. Malone, Dodge City, KS
Administrative Law Judge, Garden City, KS
Philip S. Harness, Director